IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, [redacted] 1961

No. [redacted] Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER, DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

BRIEF OF THE STATE OF UTAH OPPOSING THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATE OF UTAH AS A PARTY TO THIS ACTION.

E. R. CALLISTER,
Attorney General
of the State of Utah,
State Capitol Building,
Salt Lake City, Utah

KEN CHAMBERLAIN,
Assistant Attorney General
of the State of Utah,
State Capitol Building,
Salt Lake City, Utah
Attorneys for the Respondent
State of Utah.

CONTENTS

CONTENTS—Continued

CASES AND AUTHORITIES CITED

CONTENTS—Continued

BILLS, HEARINGS AND DOCUMENTS

INTERSTATE COMPACTS

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 10 Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER, DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants.

UNITED STATES OF AMERICA,

Intervener,

STATE OF NEVADA,

Intervener.

BRIEF OF THE STATE OF UTAH OPPOSING THE MOTION OF THE CALIFORNIA DEFENDANTS TO JOIN THE STATE OF UTAH AS A PARTY TO THIS ACTION.

INTRODUCTORY STATEMENT

On July 15, 1954, the present motion was filed by the California defendants, asking the joinder of the States of

Utah, New Mexico, Colorado, and Wyoming. On October 26, 1954, this court granted those four states leave to file briefs responsive to that motion.

While the motion is unanimously opposed by those states respondent to it, their respective briefs must deal with slightly divergent considerations since their positions differ, to a limited extent, under the Colorado River Compact, (Exhibit A, Arizona's Bill of Complaint) hereinafter referred to as "Compact." While all four respondents are "States of the Upper Division" (Article II (c), Compact) the states of Utah and New Mexico lie partially within the Lower Basin (Article II (9) Compact) and are, to the extent that parts of those states lie in areas naturally draining into the main stream of the River below Lee Ferry[1], states of the Lower Basin.

Since Utah denies that they are either necessary or indispensable parties by virtue of interests either as a state of the Upper Division or as a state lying in part in the Lower Basin, it is her election to file a separate brief and to traverse, separately and affirmatively, the contentions that Utah is a necessary party under either characterization; however, Utah does join in and subscribe to all the factual statements and references, and all the legal arguments and conclusions contained in the briefs of the other respondent states, Colorado, New Mexico and Wyoming.

STATEMENT OF THE ISSUES RAISED

On January 19, 1953, the State of Arizona was granted her Motion for Leave to File a Bill of Complaint against the several California defendants. In the Bill filed pursuant

---

[1]Although Utah will show that this interest in terms of percentage of flow is infinitesimal, Infra page 16.

to that Order Arizona asked this court to determine three issues:

> (1) Is the State of California limited to the annual beneficial consumptive use of 4,400,000 acre feet of the waters of the Colorado River System *apportioned to the Lower Basin by the Compact?*
>
> (2) In what manner is "beneficial consumptive use" of the waters of the Colorado system *in the Lower Basin* to be measured?
>
> (3) How are evaporative reservoir losses from *Lower Basin* main stream impounding facilities to be charged?

(See Arizona's Motion for Leave to File Bill of Complaint and Bill of Complaint, Par. XXII, page 25.)

In response to this Motion and to the Bill of Complaint, California raised three additional questions:

> (a) Is Arizona a party to and bound by the Colorado River Compact?
>
> (b) May Arizona be a beneficiary under the California Limitation Act?
>
> (c) What are the priorities of contract between the United States and water users *in the Lower Basin?*

It may clearly be seen from the issues thus drawn that the only purpose of the action was the determination, as between the two states in the Lower Basin, Arizona and California, of the water use to which each respective state is entitled under the Colorado River Compact, the California Limitation Act, and the various other enactments constituting the Law of the River.

Pending before the 83rd Congress were two measures, S-1555 and HR-4449, which were companion bills to

authorize the Upper Basin Storage Project consisting of a reclamation program for storage of waters in the Upper Basin of the Colorado River. On January 26, 1954, in a hearing before the Irrigation Subcommittee of the House Committee on Interior and Insular Affairs, Mr. Northcutt Ely, counsel for the defendant State of California, appeared before the Subcommittee asking it to defer any action upon the bill then being considered until after a determination of the issues raised by the present controversy. (See Hearings on H.R. 4449, page 697, Serial No. 11 before Irrigation and Reclamation Subcommittee of the House Committee on Interior and Insular Affairs, 83rd Cong.) This Subcommittee rejected Mr. Ely's arguments favoring deferral of the measure and the bill came dangerously, insofar as defendants were concerned, close to passage but failed of enactment due to early adjournment of the Congress.

On April 5, 1954, in answer to a petition of the United States to intervene in the within action, the State of California had summarized the controversy (see Answer of California defendants to Petition in Intervention on behalf of the United States of America, page 67) which summary we paraphrase as follows:

> (I) The quantities of water in controversy; Arizona seeks to quiet title to the consumptive beneficial use of 3,800,000 acre feet per annum of the waters of the Colorado River System—California asserts a right to the beneficial consumptive use in California of 5,362,000 acre feet per annum; Nevada seeks to quiet title in herself to 539,100 acre feet per annum. The states differ in their definition of "beneficial consumptive use."
>
> (II) The ultimate issues; does the United States have rights "as against the parties to this cause," (meaning those parties at the time California re-

sponded to the United States' Petition). Is Arizona entitled to a decree quieting title to 3,800,000 acre feet per annum? Is California entitled to a decree permitting the beneficial consumptive use of 4,400,000 acre feet per annum plus one-half of the surplus waters unapportioned by the Compact and the rights awarded California by contracts between the United States and the defendant public agencies of and including California?

While California *now* contends, in her analysis of the issues raised, that these questions may not be effectively determined without concurrently determining the rights and obligations of the Upper Division states, nevertheless, the actual analysis by California of the issues in the lawsuit on April 5, 1954, in no way extended to any of those states not then parties to the action. California's only reservation on that question was a general statement that decisions on those points would affect absent states. (p. 75, California's Answer to United States' Petition).

On July 15, 1954, however, California filed the present motion to make the states of the Upper Basin and of the Upper Division parties to this action, attempting materially to broaden the scope of this suit beyond their previous analysis of the necessary issues.

SUMMARY OF ARGUMENT

The State of Utah is neither a necessary nor an indispensable party for the reason that they are a party to the Compact.

The State of Utah contends that this is not an action to determine any rights of Upper Basin States; that this is *not* an action in which the rule, requiring all parties to a litigated

contract to be present in the action, is applicable for the reasons that:

(1) That rule is not available against a sovereign state in the absence of present or imminently threatened injury, of which there is none alleged or in fact in existence; and

(2) This is not an action based primarily upon the Compact.

The State of Utah is neither a necessary nor an indispensable party by reason of its interest in the Lower Basin.

For their share of the waters of the Lower Basin the State of Utah looks to, and is satisfied with the recognition of their rights by, the State of Arizona, with whom they are presently negotiating for a compact. The inclusion of Utah as a party to this action would effectively and absolutely preclude consummation of any such apportionment by agreement, the medium through which *all* inter-state matters or disputes should be resolved.

The State of Utah is neither a necessary nor an indispensable party as a beneficiary of California's Self-Limitation Act.

The only dispute in this action is the question whether or not Arizona is a beneficiary, or entitled to rely upon, that Act.

Utah is neither a necessary nor an indispensable party by reason of the claims of the United States.

The State of Utah is a party to the Upper Colorado River Basin Compact by which it has been agreed that uses by the United States in the State of Utah — as in all other

Upper Basin states — will be charged as a use *by* the State of Utah.

The purpose and motive of the present motion by the California defendants are improper and ought not to be entertained.

ARGUMENT

The State of Utah will seek to answer the contentions of the State of California in the order of their appearance in California's Motion:

POINT 1

A DECREE DETERMINING THE PRESENT CONTROVERSY CAN BE EFFECTIVE IN THE ABSENCE OF THE STATE OF UTAH ALTHOUGH A PARTY TO THE COMPACT.

In California's brief supporting her motion to join, numerous decisions are collected which hold, admittedly, that in actions upon contracts, decrees construing the terms thereof cannot be entered unless all parties thereto are present in the action. These decisions are all applicable in their own peculiar set of facts but California cites no cases—and there are none—holding that the indispensable or even the necessary party rule is applicable with respect to compacts between states as quasi-sovereigns. It is respectfully submitted that in this case neither the issues nor the facts even closely approximate the burden required of the state which asks relief against another state. The extent of that burden is announced in *Colorado v. Kansas,* 320 U. S. 383, 88 L. Ed. 116 at p. 124:

"Not every matter which would warrant resort to equity by one citizen against another would just-

> ify our interference with the action of the state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using or threatening to use more than its equitable share of the benefits of a stream, all the facts which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."

In that case an attempt was made by Kansas to show injury resulting from a material increase in the river depletion by Colorado of the Arkansas River since the adjudication of *Kansas* v. *Colorado* (206 U. S. 46, 51 L. Ed. 956, 27 S. Ct. 655) in which a bill brought by the state of Kansas was dismissed because Kansas was not entitled to "present relief;" it being expressly reserved, however, that the dismissal was without prejudice to the right of Kansas to initiate new proceedings "whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas River by the defendants, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states" (206 U. S. at page 117-118). That case was decided in 1907 and Kansas claimed in 1943 that the condition of the 1907 decree had been fulfilled, i.e., injury to the substantial interests of Kansas by Colorado uses in excess of those occurring in 1907.

It might be said that those two states, since the 1907 decision, were operating under a "decree of the court" subject to a reopening at a future time when present injury existed. An attempt to reopen that decree was denied Kansas upon the lack of sustaining the burden that Kansas was presently injured by Colorado depletion of the Arkansas

River. It might be contended that the two states, operating under a decree of the court which indicated a formula for equitably apportioning the benefits of the stream, were operating under a governing instrument similar to the Compact under which signatory states of the Colorado River Compact are presently operating, and that although injury was threatened the court would still refuse to make a definite apportionment of the river in either second feet or acre feet in the absence of a showing that a state was presently injured by excess depletion of the waters of the river.

California cites at the conclusion of her motion the case of *Nebraska* v. *Wyoming and Colorado,* 325 U. S. 589, 89 L. Ed. 1815. Colorado, in that case, made a motion that they be dismissed and California cites, as favorable to their position, the refusal of the court to grant that motion. However, the decision expressly says, 325 U. S. at 609:

> "Out-of-priority diversions by Colorado have had an adverse effect downstream. * * * *This alone negatives the absence of present injury*" (Emphasis added).

Further, on page 1827 (325 U. S. at 610):

> "Colorado v. Kansas, 30 U. S. 353, 88 L. Ed. 116, 64 S. Ct. 176, is not opposed to this view. That case turned on its special facts. It is true that an apportionment of the waters of an interstate river was denied in that case. But the downstream state (Kansas) did not sustain the burden of showing that since the earlier litigation between the states there had been a material increase in the depletion of the river by Colorado. * * * We held that in those circumstances a plain showing was necessary of increased depletion and substantial injury that would warrant a decree * * *."

California at page 51 of her brief further contends that "all parties having interests in the Colorado River System waters must be joined." This statement is not in accord with previous rulings of the United States Supreme Court. In *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568, an action by Nebraska seeking equitable apportionment of the waters of the North Platte River, the defendant Wyoming moved to dismiss under her contention that the State of Colorado was an indispensable party having an interest in the North Platte River System, and in whose absence the controversy could not be effectively settled. This court at 295 U. S. page 43, stated:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit."

By a subsequent amendment Nebraska alleged that Colorado "by diversions of water from the river for irrigation purposes * * * [are] depriving Nebraska of water to which she is equitably entitled" (*Nebraska* v. *Wyoming*, 325 U. S. 589, 591-2, 65 S. Ct. 1332, 1338). Upon the basis of the amended complaint the court joined Colorado as a party. *Nebraska* v. *Wyoming*, 296 U. S. 553, 56 S. Ct. 369.

A thorough analysis of the voluminous pleadings filed herein discloses absolutely no allegation that injury is threatened either by or to the State of Utah either as a state of the Upper Division or as a state of the Upper Basin entitled to limited participation in the "common-fund" of waters allocated by the Colorado River Compact to the Lower Basin. No such allegation—under the actual facts—could in good faith *be* made.

In numerous decisions this court has held that declaratory decrees, determining rights to interstate or local waters which have not yet been and which may never be appropriated, are not available to any state. *New Jersey* v. *Sargent*, 269 U. S. 328, 338, 46 S. Ct. 122, 70 L. Ed. 289; *Arizona* v. *California, et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529; *Colorado* v. *Kansas*, 320 U. S. 383, 393, 394, 64 S. Ct. 176, 181, 88 L. Ed. 116, 120; that adjudication of rights to interstate waters must be founded on an existing justiciable controversy. *Arizona* v. *California, et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529; that alleged injury must be presently threatened and of serious magnitude and not merely something feared to occur at some future time. *Missouri* v. *Illinois*, 200 U. S. 496, 521, 26 S. Ct. 268, 270; *New York* v. *New Jersey*, 256 U. S. 296, 309, 26 S. Ct. 268, 270; *North Dakota* v. *Minnesota*, 263 U. S. 365, 374, 44 S. Ct. 138, 139; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669, 51 S. Ct. 286, 289; *Alabama* v. *Arizona*, 291 U. S. 286, 291, 54 S. Ct. 399, 401; *Washington* v. *Oregon*, 297 U. S. 517, 522, 56 S. Ct. 540, 542; and that to pre-determine the rights of different sovereignties pregnant with future controversies is beyond the judicial function; that the court's jurisdiction is limited to concrete legal issues presented in actual cases and not abstractions. *U. S.* v. *Appalachian Power Company*, 311 U. S. 377, 423, 61 S. Ct. 299, 306.

It must be emphasized that the Colorado River Compact, the Compact now sought to be construed by the states of Arizona and California, and which Compact, it is alleged by California, cannot be effectively construed without the presence of all states signatory thereto, *was never intended to divide the water use among either the states of the Upper Basin, the states of the Lower Basin, the states of the Upper Division, or the states of the Lower Division.* It is, on the contrary, a compact *dividing only the water as between one*

entity, the Upper Basin, and a second entity, the Lower Basin.

The division of the waters apportioned to either basin as between the states of that basin is a matter entirely outside the scope of the Compact.

This litigation involves only the right to the use of the waters of the Colorado River System after the same have passed Lee Ferry, Arizona, or which originate on tributaries in the Lower Basin. (And Utah, as will be shown in the Argument under Point 2 herein, is not involved in *any* dispute—much less a justiciable controversy—over her share of those waters characterized as "Lower Basin" waters.) None of the parties to the action (Arizona the plaintiff, the California defendants, nor the intervenors Nevada and the United States) has questioned the right of the Upper Basin states to the beneficial consumptive use of 7,500,000 acre feet of the water of the Colorado River System.

An examination of the issues as analyzed by either the State of California or the State of Arizona and a study of the contentions of the State of Nevada and the United States fail to disclose any allegation or even any inference that the Upper Basin states separately or collectively threaten any injury to the Lower Basin states. None of the states presently parties to the action seeks the enforcement of the Compact against any states of the Upper Basin. There is no injury of which they could complain. As has been said heretofore, the Compact apportions 7,500,000 acre feet per annum to each Basin. The present beneficial consumptive use in the Upper Basin is but approximately one-third of that apportionment under Article III(a) or about 2,500,000 acre feet. It is not in keeping with the practice of this Court to entertain an action against a state even where a contract is involved when any breach can occur only in the remote

future, if at all. The time when the Lower Basin may have its day in Court will be the time when, if ever, the Upper Basin states' use exceeds that figure some three times greater than their present use. To determine those questions involving hypothetical situations which may arise in the future would be palpably unfair to the states of the Upper Basin who are entitled to a decision on none other than actual controversies in fact in existence.

On pages 31 to 53, inclusive, California's brief sets forth various questions of interpretation of the Compact which, it is contended, the respondent states ought now to be required to litigate. We concur with and join in the seriatim treatment of these points by the States of Colorado and Wyoming, who have ably disposed of each. We wish to add, however, that irrespective of the final determination by this Court of any of those interpretation questions, there still is no violation by the State of Utah or the Upper Basin of any of the terms of the Compact; no diversions in excess of those granted the respondents under the Compact; and therefore, no justiciable issue either upon the pleadings or upon the facts. *Nebraska* v. *Wyoming,* 295 U. S. 40, 55 S. Ct. 568, *Colorado* v. *Kansas,* 320 U. S. 383, 88 L. Ed. 116.

Since it was never intended that the Compact divide the waters of the Colorado River between states, but only between basins, this action can only be a Lower Basin dispute since they have failed to negotiate by Compact for a division of their apportionment. This the Upper Basin has done, and their apportionment among themselves of water use, and their resolution of many of the questions California now would require them to litigate, were approved by Congress (63 Stat. 31). The full text of this Compact appears as Appendix 30, Vol. II Appendixes to California's Answer.

In Summary under California's Paragraph I, the State of Utah denies that no decree determining the meaning and

effect of the Colorado River Compact can be effective in the absence of all parties to that Compact and contends that Utah is neither indispensable nor necessary; that Utah on the contrary cannot be made a party to this action for the reason that injury is neither threatened to nor by the State of Utah.

POINT 2

UTAH IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY FOR THE REASON THAT THEY SHARE INTERESTS IN THE LOWER BASIN.

The State of Utah concurs in Arizona's Bill of Complaint, page 19, para. XIII, line 18, and page 21, para. XVII (a). Utah also expresses concurrence in the allegation of Arizona in response to California's motion to join the states of Colorado, New Mexico, Utah and Wyoming found on page 7, para. XII. These references to which Utah subscribes and by which Utah is satisfied that their interests in the Lower Basin are recognized, read as follows:

Arizona's bill of complaint:

Para. XIII, line 15 (page 19):

> "The United States also agrees to deliver to Arizona from Lake Mead storage one-half of the unappropriated surplus, subject to the availability thereof to Arizona under the Compact and *subject to whatever rights Nevada, New Mexico and Utah may be determined to have therein*" (Emphasis added).

Para. XVII (a) (page 21):

> "(a) Subject to the availability of water under the Compact and the project act and *subject to the rights of the states of New Mexico and Utah,*

> Arizona has the right to take and divert from the Colorado River System annually so much water as may be necessary for the beneficial consumptive use in Arizona of 3,800,000 acre feet * * *" (Emphasis added).

Response of Arizona to California's motion to join Colorado, New Mexico, Utah, and Wyoming:

Para. 8 (page 5):

> "Complainant alleges that the only uses of water from the Colorado River System by the State of Utah in the lower basin are on the Virgin River within that state and the *complainant is presently engaged in negotiating a Compact with that State respecting such uses, and that there is no dispute existing between complainant and the state of Utah*" (Emphasis added).

Certainly Arizona seeks no relief as against the Upper Basin generally or against the State of Utah specifically. California seeks no relief against the State of Utah either as a state of the Upper Basin having an interest in the "common fund" of water in the Lower Basin or as a state both of the Upper Division and of the Lower Basin. In neither California's affirmative defenses to Arizona's complaint nor in their traverse to the allegations of Arizona or to any other party may be found any contention seeking or demanding relief to the State of California against the State of Utah as either a state of the Upper Basin or as a state of the Lower Basin. Without such an allegation—and no such allegation could in good faith be made—there is nothing in the pleadings nor in the provable facts to be determined which can possibly disclose a necessity to bring Utah into the suit. *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568.

The interests of the State of Utah in the waters of the Lower Basin are certainly *de minimus*. Their maximum

rights and claims to the waters of the Lower Basin do not equal in magnitude even 2½ percent of the water allocated by the Compact to the Lower Basin exclusive of surplus or unappropriated water. Clearly applicable here is the statement of this court in *Colorado* v. *Kansas*, 320 U. S. 383, 88 L. Ed. 116 at page 124:

> "Before the court will intervene the case must be of serious magnitude and fully and clearly proved."

Unquestionably there is no alleged wrongful act of the State of Utah and no prayer for relief against that state such as is required by the doctrine of *Nebraska* v. *Wyoming*, 295 U. S. 40, 55 S. Ct. 568. Certainly this is the precise situation of which this court was speaking in *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116), when it held that the Supreme Court would not intervene in actions between sovereign states in matters best settled by compact. Decisively should they refuse to intervene where it appeared that the matter might be amicably settled by mutual agreement or diplomatic relations between the states. (See also *Washington* v. *Oregon*, 214 U. S. 205, 218, 53 L. Ed. 969, 971, 29 S. Ct. 631.) To draw the State of Utah into this dispute upon the ground that they are presently interested but neither injured nor threatening injury in a controversy between the States of California and Arizona with respect to waters by the great preponderance in magnitude owned and vested in those other states would be absolutely to preclude the possibility of an amicable settlement of Utah's rights by compact and by negotiations. This contention fits squarely within the rule announced in *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116), where this court said, 320 U. S. at page 392:

> "The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve

the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, *that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power*" (Emphasis added).

POINT 3

ABSENCE OF UTAH AND THE STATES OF THE UPPER DIVISION DOES NOT PRECLUDE AN EFFECTIVE INTERPRETATION OF THE ENACTMENTS AND COMPACTS KNOWN AS THE LAW OF THE RIVER UPON THE GROUND THAT THOSE ABSENT STATES ARE THIRD PARTY BENEFICIARIES TO THOSE STATUTORY ENACTMENTS OR STATUTORY COMPACTS.

The statutory compacts to which reference is made by California in their motion are the Boulder Canyon Project Act (45 Stat. 1057) and the California Self Limitation Act (Ch. 16, Calif. Statutes, 1929, p. 38). These acts are set out at length at pages 9 to 31 in Appendixes to California's Answer to Arizona's Bill of Complaint on file herein. The State of Utah adopts the argument of the States of Colorado and Wyoming in their brief concurrent hereto, without reiterating their arguments to this point.

It may be said, for purposes of continuity and integration of this brief, that the crux of this particular dispute is

whether or not Arizona is entitled to place reliance upon the California Self Limitation Act adopted as a condition to fulfillment of the Boulder Canyon Project Act (which authorized the construction of Hoover Dam,) for the reason that Arizona delayed ratification of the Colorado River Compact. This is purely an intra-basin problem between *California* and *Arizona* and does not involve either an obligation of the Upper Basin or of any other states. It does not involve Utah as a Lower Basin participant because the question is solely whether *Arizona* may place reliance on the Limitation Act.

California does not allege that the Upper Basin states or the State of Utah, New Mexico or Nevada are no longer beneficiaries to the Act or that any duties are imposed upon any of those states or that Basin by reason of their characterization as such beneficiaries.

POINT 4

THERE IS NO JUSTICIABLE CONTROVERSY EXISTING BETWEEN RESPONDENTS AND THE UNITED STATES REQUIRING THE PRESENCE OF RESPONDENTS AS PARTIES TO THIS ACTION.

The State of Utah concurs in the more amplified treatment given this point in Colorado's brief.

We only add that the United States intervened, as we comprehend their Motion and Petition in Intervention, to secure the water use rights of its agencies, instrumentalities, or wards; at least insofar as the Upper Basin States are concerned. To this point in California's Motion, the complete answer is that by Article VII of the Upper Colorado River Basin Compact, (63 Stat. 31, Vol. 2, Appendix 30, Cal. Appendixes to the Answer) it has been agreed that those uses

by the United States shall be, as to the Upper Basin, charged as a use by the state in which such use is made .

Here again, California is attempting to inspire determination by litigation of a problem already settled by negotiations and Compact. This again illustrates California's ostensible purpose to defeat the doctrine that this Court will not permit invocation of its jurisdiction over a state when the matter should and can be [and indeed this particular problem has been] settled through the medium of accommodation and agreement. *Colorado* v. *Kansas* (320 U. S. 383, 88 L. Ed. 116).

CONCLUSION

After Arizona had been granted leave to file a Bill of Complaint in this action, after the issues had been joined by an Answer, a Reply, and a Rejoinder, after two petitions to intervene had, after response by the parties, been granted, and after a Special Master had been appointed, this motion by the California defendants was filed.

It was also filed after counsel for the movant had urged deferral of Congressional authorization of the Upper Colorado Project until issues in the pending action between California and Arizona could be settled[2]. The body before whom this argument was developed apparently rejected the logic presented, by a recommendation approving the project. The granting of the present motion would be a tangible encouragement for the re-assertion of that same argument. We respectfully submit that this motion is calculated to delay both the pending litigation and the proposed project.

Whatever the movants' purpose might be, we further contend that they have not and cannot assert a ground upon which any relief against the State of Utah may be granted.

---

[2]See Hearings before Subcommittee on Irrigation and Reclamation, House Committee on Interior and Insular Affairs on H. R. 4449, p. 697.

THE STATE OF UTAH AS AN UPPER BASIN STATE

As this and the concurrent briefs of respondents to this motion have demonstrated, this is a dispute involving waters apportioned to the Lower Basin. The Compact under which California seeks to join the absent states as "parties to a contract" never has had as any of its purposes, the distribution of waters between states within a Basin; therefore the numerous questions isolated by the California defendants which pertain to such a distribution between them and the other present parties cannot come under the aegis of the Compact. In other words, this is not a suit upon the Compact.

The only suit which could be brought under the Compact would be for the determination of inter-basin rights and obligations. No allegations charge any violation of the Compact by the Upper Basin. No such allegation could in good faith be made. Present injury must be alleged[3].

UTAH AS A STATE ENTITLED TO PARTICIPATE IN THE LOWER BASIN.

The State of Utah has a limited right of participation in the Lower Basin waters. They are now negotiating with Arizona for a distribution of their share by Compact. For this court to assume jurisdiction over Utah under that situation would be contrary to this court's holdings that matters between states should be settled by negotiation and Compact[4]; that a justiciable disputed issue must be in existence[5];

---

[3] *Nebraska* v. *Wyoming*, 325 U. S. 589, 89 L. Ed. 1815.

[4] *Washington* v. *Oregon*, 214 U. S. 205, 218, 53 L. Ed. 969, 971, 29 S. Ct. 631.

[5] *Missouri* v. *Illinois*, 200 U. S. 496, 521, 26 S. Ct. 268, 270.

or imminently threatened[6]; of serious magnitude[7]; and fully and clearly proved[8].

We respectfully contend that the State of Utah should not be joined as a state of the Upper Basin or as a state entitled to participate in the waters of the Lower Basin, and that the motion of the California defendants should be denied.

---

[6]*Connecticut* v. *Massachusetts*, 282 U. S. 660, 669, 51 S. Ct. 286, 289.

[7]*Colorado* v. *Kansas*, 320 U. S. 383, 88 L. Ed. 116, 124.

[8]Ibid.

Respectfully submitted,

E. R. CALLISTER,
Attorney General
of the State of Utah,
State Capitol Building,
Salt Lake City, Utah

KEN CHAMBERLAIN,
Assistant Attorney General
of the State of Utah,
State Capitol Building,
Salt Lake City, Utah

Attorneys for the Respondent
State of Utah.

BRIEF OPPOSING MOTION OF CALIFORNIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 10 Original

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, *Defendants.*

UNITED STATES OF AMERICA, *Intervener,*

STATE OF NEVADA, *Intervener.*

BRIEF OF NEW MEXICO OPPOSING MOTION OF CALIFORNIA TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING.

PRELIMINARY STATEMENT

On the 26th day of October, 1954, the Court entered an Order in this case which reads as follows:

> "Motion of California in ten original to join Colorado, New Mexico, Utah and Wyoming will be held for sixty days to enable those states to file printed responses."

In response to the Order of the Court, Colorado and

Wyoming have filed herein their separate brief limited to the question of joinder from the standpoint of the four states, Colorado, Wyoming, New Mexico, and Utah, as States of the Upper Basin. The status of Colorado, Wyoming, New Mexico and Utah as Upper Basin states, or as States of the Upper Division, are all identical insofar as the question of joinder is concerned. However, as will be seen by examination of the language of the Colorado River Compact of 1922, New Mexico and Utah are also states of the Lower Basin. For this reason, New Mexico adopts the brief filed herein by the states of Colorado and Wyoming in opposition to joinder based upon the Motion of California. However, in view of the fact that the brief filed by Colorado and Wyoming does not deal with the status of New Mexico and Utah as states of the Lower Basin, we deem it appropriate for these two states to file separate briefs opposing the Motion to join based upon the status of New Mexico and Utah as states of the Lower Basin.

STATUS OF NEW MEXICO AS DEFINED IN COLORADO RIVER COMPACT OF 1922

Article II of the 1922 Compact reads in part as follows:

"As used in this compact: —

(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also

all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

Article III reads in part as follows:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre feet per annum."

Thus by Article II c and II f, New Mexico is one of the "States of the Upper Division" and of the "Upper Basin"; also by II g it is one of the States of the "Lower Basin". (Text of Colorado Compact, November 24, 1922, Page 1, Appendixes to the Answer of California).

It should be noted that the allocation of "exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum," to both the Upper Basin and to the Lower

Basin, III a, includes "all water necessary for the supply of any rights which may *now* exist." The provisions of III b refers to the right of the Lower Basin to *increase* its beneficial consumptive use of such waters by one million acre feet per annum.

By Article VIII "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."

STATEMENT OF POSITION OF NEW MEXICO

New Mexico's principal interest in the consumptive use of water from the Colorado River System arises because of its status as one of the four states of the Upper Basin and of the Upper Division. Its interest as a State of the Lower Basin is dependent upon its ability to make consumptive use of a portion of the water of the Gila River and its tributaries which rise in the Western part of the State of New Mexico and flow across Arizona and into the Colorado River. It is physically impossible for New Mexico to divert for consumptive use in the State any waters from the main stream of the Colorado River, or from Lake Meade or any other reservoir on the main stream. Her water must come from the Gila or its tributaries in New Mexico, or possibly by exchange with Arizona, of main stream water for tributary water, which can be effected by negotiation —not by litigation.

The quantity of water which it may divert for beneficial consumptive use within the State is limited by physical and geographical factors. The acreage presently being irrigated is less than 10,000 acres, a figure which is infinitesimal compared to the claims of Arizona and California. Both states, however, recognize that New Mexico has the

right to an equitable share of the beneficial consumptive use of the waters of the Gila and its tributaries. (Answer of Defendants, page 66, paragraph 63—Bill of Complaint, page 30, Brief of Arizona.)

ARGUMENT

New Mexico objects to being joined as a party to this litigation because:

1. The pleadings do not show the existence of a justiciable controversy within the original jurisdiction of this court between New Mexico and any other party to the cause of action. This is true whether the status of New Mexico is considered as a "State of the Upper Division" or as a State of the Lower Basin.

2. The equitable share of New Mexico as a State of the Lower Basin, to the allocations made by Article III a and III b of the 1922 Colorado River Compact to the States of the Lower Basin, is admitted by both Arizona and California and disputed by no other party. It is not in the best interest of New Mexico at this time and in the present suit to be compelled to litigate and have determined the exact magnitude of this equitable share in terms of acre feet of water. Nor do the issues made by the pleadings between the real parties to this case make necessary the determination of the magnitude of such equitable interest of New Mexico at this time. Such a determination would depend upon facts that are hypothetical and highly speculative and under existing conditions would be premature.

3. Rule No. 19 of the Rules of Civil Procedure is not applicable or appropriate in this case.

4. It is not contended by California that the four

states of the Upper Division are "indispensable" parties in the sense that the case may not proceed without them.

5. Joinder of the four states at this time, under present status of pleadings, would be premature.

The following principles apply on the question of joinder of all four states, Colorado, Wyoming, Utah, and New Mexico, as well as to New Mexico and Utah as states of the Lower Basin:

> It will not grant relief against a state unless the complaining state shows an existing or presently threatened injury of serious magnitude. *Missouri vs. Illinois,* 200 U.S. 496, 521; *New York vs. New Jersey,* 256 U.S. 296, 309; *North Dakota vs. Minnesota,* 263 U.S. 365, 374; *Connecticut vs. Massachusetts,* 282 U.S. 660, 669; *Alabama vs. Arizona,* 291 U.S. 286, 291; *Washington vs. Oregon,* 297 U.S. 517, 528.
>
> A potential threat of injury is insufficient to justify an affirmative decree against a state. The court will not grant relief against something feared to occur at some future time. *Alabama vs. Arizona,* supra. The judicial power does not extend to the determination of abstract questions. *New York vs. Illinois,* 274 U.S. 288; *United States vs. West Virginia,* 295 U.S. 463.
>
> The court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity. *Alabama vs. Arizona,* supra., *Arizona vs. California,* 283 U.S. 423; *U. S. vs. West Virginia; Massachusetts vs. Missouri.*
>
> To predetermine, even in the limited field of water power, the rights of different sovereignties pregnant with future controversies, is beyond the judicial function. *U.S. vs. Appalachian Power Company,* 311 U.S. 377, 432.
>
> The exercise of original jurisdiction in an inter-state

case is not mandatory. (Georgia vs. Pennsylvania Railroad Company, 324 U.S. 439, 464; North Dakota vs. Chicago and Northwestern Railroad Company 257 U.S. 485.) The mere fact that a state is plaintiff is not enough (Wisconsin vs. Pelican Insurance Co., 127 U.S. 265; Oklahoma vs. A.T. & S.F. Ry., 220 U.S. 277).

Rule 19 of the Federal Rules of Civil Procedure is not necessarily controlling in this case. Rule 9 of the Supreme Court rules governing procedure in original actions, sub-paragraph 2 reads as follows: "The form of Pleadings and Motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a *guide* to procedure in original actions in this court." Sub-paragraph 3 of the rule governs the filing of the initial Pleading in an original action, and the procedure followed by the court in either granting or refusing a Motion for leave to file the initial petition. Sub-paragraph 6 of the rule states "additional Pleadings may be filed and subsequent proceedings had as the court shall direct."

In this case, the State of Arizona filed its Motion for leave to file its initial pleading and leave was granted by the court. The court no doubt determined that the petition stated a justiciable controversy between the State of Arizona and State of California and the nine additional defendants. California answered the petition of Arizona and joined issue on the allegations of Arizona's petition and asserted four affirmative defenses. Subsequently, the United States and the State of Nevada sought and were granted leave to intervene. We submit that the initial petition of the State of Arizona did not state a justiciable controversy with the states of Colorado, Wyoming, Utah and New Mexico. We submit further that neither the State of

Nevada nor the United States has alleged any fact creating a justiciable controversy with either of the four absent states.

In the case of *Nebraska vs. Wyoming,* 295 U.S. at page 43, the Court said:

> "Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit."

We believe the above language is applicable to the pleadings in this case and that the motion of California should be denied.

RICHARD ROBINSON,
Attorney General of the State of New Mexico,
State Capitol Building,
Santa Fe, New Mexico.

FRED E. WILSON,
Special Assistant Attorney General for the State of New Mexico,
806 First National Bank Building,
Albuquerque, New Mexico.